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IN THE

Supreme Court of the United States

October Term, 1973

No. [redacted]

IN THE MATTER OF JOHN McCANDLESS, Debtor in Proceedings for an Arrangement,
IN THE MATTER OF KING RESOURCES COMPANY AND INTERNATIONAL RESOURCES LIMITED, Debtors in Proceedings for Reorganization of Corporations,

THE COLORADO CORPORATION,

Petitioner,

v.

CHARLES A. BAER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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IN THE

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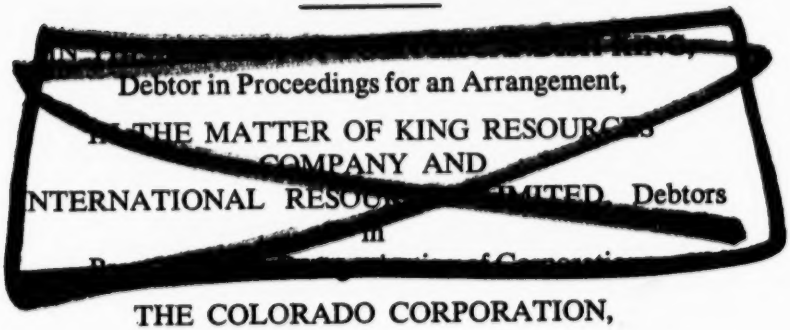
No. ———



THE COLORADO CORPORATION,

Petitioner,

v.

CHARLES A. BAER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of The Supreme Court of The United States:

Your petitioner, The Colorado Corporation, also called "TCC", prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above-entitled case on June 19, 1973, rehearing denied August 13, 1973.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit to which this petition is addressed, filed on June 19, 1973, is reported at .... F.2d .... and is printed at pages 17-25 of the Appendix.

The excerpts from the transcripts of proceedings before the United States District Court for the District of Colorado in proceedings styled *In re King Resources Company and International Resources Limited* and numbered 71-B-292Y and 72-B-644, embodying the oral findings, conclusions and orders of the court are not reported but are printed in the Appendix at pages 28-34.

JURISDICTION

This petition for writ of certiorari seeks review of the judgment of the United States Court of Appeals for the Tenth Circuit in three appeals from the United States District Court for the District of Colorado. The three appeals were consolidated and judgment in all three was entered on June 19, 1973. The petitioner was appellant in, and here seeks review of, one of the three appeals.

No. 72-1516 originated in proceedings under Chapter X of the Bankruptcy Act, 11 U.S.C. §§ 501 et seq., in which your petitioner was respondent to an order to show cause why a certain contract should not be rejected as executory under Bankruptcy Act § 116(1), 11 U.S.C. § 516(1). On May 30, 1972, the District Court entered its order authorizing rejection. By Notice of Appeal filed June 27, 1972, and perfected by duly filing appeal bond, your petitioner appealed said order under the provisions of Bankruptcy Act §23a, b, 11 U.S.C. § 47a, b.

On June 19, 1973, the United States Court of Appeals

for the Tenth Circuit entered its judgment denying your petitioner's appeals and affirming the decisions of the courts below. On August 13, 1973, the Court of Appeals denied petition for rehearing and stayed mandate until September 22, 1973, pending the timely filing of a petition for writ of certiorari in the Supreme Court of the United States. If, on or before that date, the clerk of the Court of Appeals receives notice from the Clerk of the Supreme Court that a timely petition for writ of certiorari has been filed, the stay of mandate shall continue until final disposition by the Supreme Court.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Did the King Resources Company reorganization Court have summary jurisdiction to determine title to the property TCC received under the rejected contract, when there was no finding that the reorganization court had possession of the property nor that TCC's claim to the property is merely colorable?

2. If the King Resources Company reorganization court had such summary jurisdiction, was it not exercised in an inequitable manner by the reorganization court's failure to condition rejection upon restitution of the money paid by TCC or its predecessors in title for the property acquired under the contract?

STATUTES INVOLVED

The statutes and rule involved are printed in the Appendix hereto. They are:

Bankruptcy Act §63c, 11 U.S.C. § 103 c
.....Appendix, 35.

Bankruptcy Act § 116(1), 11 U.S.C. § 516 (1) .....Appendix, 35.

Bankruptcy Act § 202, 11 U.S.C. § 602 .....Appendix, 35.

Bankruptcy Act § 311, 11 U.S.C. § 711 .....Appendix, 35.

STATEMENT OF THE CASE

This Petition asks for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit to review the judgment of that court in three appeals from the United States District Court for the District of Colorado consolidated as having common questions. The Appeal No. 72-1516 arose from reorganization proceedings under Chapter X of the Bankruptcy Act in which King Resources Company ("KRC") and International Resources, Ltd. are debtors. The Colorado Corporation is appellant in No. 72-1516 and Charles A. Baer, Trustee of King Resources Company and International Resources, Ltd., is the Chapter X Trustee of both companies.

The controversy has its origin in a contract dated December 31, 1969, under which John Mecom bought an undivided 1/64 interest in certain Canadian federal oil and gas exploration permits; the permits were sold to The Colorado Corporation. The permits give right upon completion of certain amounts of exploration and development work, to obtain oil and gas leases. The permits are assignable and have value in themselves. Under the contract, The Colorado Corporation agrees to pay $2,609,120.50 as the purchase price for the interest and another $2,609,120.50 as its pro rata share of costs of exploration and development. As required by the contract, the predecessor in title of TCC paid

$260,912.05 as initial installment of the purchase price upon execution of the contract.

The KRC trustee filed an application for an order to show cause why the contract should not be rejected and in due course an order to show cause issued. The Colorado Corporation responded to the show cause order, pretrial conferences were held and the issues tried on May 30, 1972.

The issues tried by The Colorado Corporation were consolidated with a similar show cause order which the KRC Trustee procured against John M. King. Pretrial conferences and trial on May 30, 1972, were had on both the show cause order against John M. King and that against The Colorado Corporation. Ruling against John M. King was appealed to the United States Court of Appeals for the Tenth Circuit under Appeal No. 72-1515 and is the subject of a petition for certiorari in this court No. 73-059, October term, 1973.

The trial on the merits on May 30, 1972 on the Trustee's application to reject the contract was had and The Colorado Corporation depended upon and presented the same testimony as was adduced on behalf of John M. King. Trustee testified that he sought to reject the contract because he wished to handle the permits free of any claim of a third party. He said the permits were in danger of being forfeited because the necessary exploration and development work was not being done, and that KRC was unable to perform the necessary work. One reason given was that the purchasers from KRC, including King and The Colorado Corporation, were not making payments of their agreed share of the costs; he also testified that the trustee would be unable to make restitution of the $260,912.05 down payment made by The Colorado Corporation's predecessor in title should the court condition rejection on restitution. This testimony in

the face of several millions of dollars required to complete the development and exploration costs.

On hearing May 30, 1972, testimony was adduced from Mr. John M. King that the value of a 1/64 interest in the permits had appreciated to $63,000,000.00. Further testimony showed that the costs of exploration and development called for by the contract either had not been performed or at best no call for the monies had been made or proof given that performance had been done. It was undisputed that the KRC trustee had not provided evidence that the interests of the owners of the permits were being adequately safeguarded nor what work was done on the permits as called for by the contract.

The KRC reorganization judge found that The Colorado Corporation obtained no "possessory rights," under the contract, that the contract represented a chose in action rather than a chose in possession and was therefore executory and rejectable. He found that equity in sound business judgment warranted rejection and authorized the trustee to reject the contract with The Colorado Corporation. (A32)

The Colorado Corporation appealed from the orders of the KRC reorganization court, asserting the rejection proceedings constituted an abuse of discretion.

The United States Court of Appeals for the Tenth Circuit affirmed all of the orders and judgments of the courts below. The Court of Appeals' opinion states that the reorganization court had summary jurisdiction to reject under the Bankruptcy Act §116(1), 11 U.S.C. §516(1), and that the reorganization court did not abuse its discretion in authorizing rejection. (A25)

REASONS FOR ALLOWING THE WRIT

The opinion of the United States Court of Appeals for the

Tenth Circuit in this matter calls into question fundamental and firmly established principles of bankruptcy court jurisdiction: . . . that a bankruptcy court lacks summary jurisdiction to determine issues of title to property when that property is not in the possession of the bankruptcy court and is subject to more than a colorable adverse claim. *Harrison v. Chamberlin,* 271 U.S. 191 (1926); see also cases collected at *2 COLLIER ON BANKRUPTCY,* ¶23.05[4] p. 488 n. 31, *6 COLLIER ON BANKRUPTCY* ¶3.05 p. 440 n. 30, p. 448 n. 45 (14th ed. 1971). In substance, the Court of Appeals affirms the summary jurisdiction of the KRC Chapter X reorganization court to determine The Colorado Corporation title to the 1/64 interest in the Canadian federal oil and gas exploration permits received under a contract with KRC as an incident to the reorganization court's jurisdiction to reject the contract under the Bankruptcy Act § 116(1), 11 U.S.C. § 516(1). This is in clear conflict with the ruling in *In re American National Trust,* 426 F.2d 1059 (7th Cir. 1970), where it was held that a Chapter X court did *not* obtain summary jurisdiction over property adversely possessed as an incident to jurisdiction to reject. Further, the Court of Appeals here tacitly approves the judgment of the KRC reorganization court which, by implication, divests TCC of its claimed vested interest in the permits, contrary to the decisions in *Laugharen v. Bank of America,* 80 F.2d 551 (9th Cir. 1937), *cert. denied.* 301 U.S. 699, and *In re H. K. Porter Co.,* 24 F. Supp. 766 (W.D. Pa. 1938), as well as the *American National Trust* decision, *supra,* holding that rejection cannot serve to divest vested title.

The Tenth Circuit opinion not only presents conflicts with the holdings in other circuits on basic principles of bankruptcy jurisdiction but also opens unresolved issues in regard to what constitutes an "executory contract" within

the meaning of Bankruptcy Act § 116(1), 11 U.S.C. § 516(1), the nature of rejection proceedings, and the scope of the reorganization court's discretion in authorizing rejection. Since rejection of an allegedly executory contract can severely affect the rights of those who claim to have received vested title to property under the contract, as is the case here, a uniform and settled decision of the circumstances under which a bankruptcy court can reach and decide issues concerning such title, and the rights and equities that must be afforded those who claim such title, is important to just and proper administration of the bankruptcy laws.

The questions presented in this case are more far-reaching than mere rejection of an executory contract. It is abundant in the record that the purpose of the KRC Trustee and the intention of the reorganization court is to divest John M. King and The Colorado Corporation of any claim to title to the interest. For example, in his application to reject the contract, the KRC Trustee alleges that The Colorado Corporation "take nothing," under the contract and that the interest of TCC "may be of great value to the debtor corporation." Before the reorganization court, Mr. Baer testified that he wished to reject the contract so that he could deal with the permits "free of any claim of any third person." The KRC reorganization judge, in his opinion authorizing rejection, concluded it would be inequitable to allow The Colorado Corporation to be "locked in," to an asset purportedly worth $63,000,000.00 and in the KRC Trustee's brief to the Tenth Circuit, the trustee argued that rejection was justified because "It is in the best interests of the reorganization estate to reject a contract and thus hold a $63,000,000.00 asset free from claims . . ."

This is expanded upon in the petition of John M. King in Cause No. 73-059 in this court.

The most conclusive evidence of the recognition of the reorganization court of the interest and its value is the fact that there can be no benefit to KRC by rejection unless The Colorado Corporation claim is divested, sound business judgment on rejection and the conclusion of $63,000,000.00 as an element of damages against the trustee cannot be consistent without divestment. The Court of Appeals could not have affirmed rejection as an exercise of sound discretion unless it approved and acknowledged the divestment.

The Court of Appeals, in holding that the contract is executory and rejectable within the meaning of Bankruptcy Act § 116(1), 11 U.S.C. § 516(1), is at odds with accepted doctrine. It is true that a contract is executory in the sense that one of the parties has not fully performed; however, KRC completed its performance by fully and completely conveying to The Colorado Corporation (its predecessor in title) all right, title and interest in and to the 1/64 interest in the permits upon execution of the contract. Where the debtor has fully performed by conveying and the only unperformed obligation may be the purchaser's obligation to pay, the contract has not heretofore been considered executory within the meaning of the Bankruptcy Act § 116(1), 11 U.S.C. § 516(1), the trustee's remedy should be a plenary action to recover the purchase price not rejection and summary retrieval of title. *In re San Francisco Bay Exposition,* 50 Supp. 344 (N.D. Cal. 1943); *6 COLLIER ON BANKRUPTCY,* ¶ 3.23 [1] p. 564 n. 8 (14th ed. 1971).

This case presents the question whether a contract under which the debtor has completely performed by conveying title and under which only a purchaser's obligation to pay may exist is an unperformed one within the meaning of Bankruptcy Act §116(1), 11 U.S.C. § 516(1). If prior law

is correct, such a contract is neither executory nor rejectable.

The question of whether the reorganization court had summary jurisdiction to reach and determine the issue of title to The Colorado Corporation's 1/64 interest as an incident to its jurisdiction to reject the contract is even more important in the face of prior law. TCC's basic objection to summary jurisdiction in the reorganization court is that KRC did not have actual or constructive possession of the rejected interest. The claim of the reorganization trustee is merely colorable.

The Court of Appeals appears to have affirmed the KRC reorganization court's summary jurisdiction solely on the basis of Bankruptcy Act § 116(1), 11 U.S.C. § 516(1), and the grounds that the contract was executory. It could not affirm on the basis of possession in the KRC Court or the ground that King's claim is merely colorable. It was the Trustee's burden to obtain findings sufficient to sustain summary jurisdiction. *Wikle v. Country Life Insurance Co.*, 423 F.2d 151, 153 (9th Cir. 1970); *In re Hayes*, 407 F.2d 1031, 1033 (6th Cir. 1969); *In re Indiana Flooring Co.*, 62 F.2d 763, 764 (2d Cir. 1933), *cert. denied* 290 U.S. 627. The Trustee obtained no such findings.[1] Therefore, if what have heretofore been accepted as fundamental principles of bankruptcy court jurisdiction are correct, the decisions below are erroneous.

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[1]The KRC reorganization judge found that King acquired no "possessory rights" under the contract, that the contract therefore represented a chose in action rather than a chose in possession and therefore was executory and rejectable. However, he appears to have been of the opinion that the permits are a property interest which, by their nature, do not give the owner "possessory rights." (A-23 - A-29.) Therefore, "possessory rights" are something distinct from "possession" in the sense used in discussing bankruptcy court summary jurisdiction, where title to an intangible gives constructive possession. KRC could no more have had "possessory rights" in the permits than could King. "Possessory rights," therefore, cannot be relevant to a determination of possession for purposes of jurisdiction.

The conflict between the Court of Appeals decision in this case and the opinion in *In re American National Trust*, 426 F.2d 1059 (7th Cir. 1970), is quite direct. In the *American National Trust* case, as in this one, the Chapter X trustee attempted to invoke the equitable powers of the bankruptcy court, alleging summary jurisdiction incidental to jurisdiction under Bankruptcy Act §116(1), 11 U.S.C. § 516(1), to summarily retrieve property which was not in the possession of the Chapter X Court and was subject to a more than colorable adverse claim. There, as here, the trustee's basic argument was such remedy was necessary to prevent the "unjust enrichment" of the owner of the property at the expense of the Chapter X estate. There, unlike the Court of Appeals opinion here, the Seventh Circuit held that the trustee's theory was an unprecedented and unjustifiable extension of the bankruptcy court's summary jurisdiction. The *American National Trust* decision cannot be reconciled with the decision here.[2]

If the *American National Trust* case rule is correct and a Chapter X court lacks summary jurisdiction to deal with property adversely possessed as an incident to rejection, a fortiori, the Chapter X Court cannot divest the purchaser of title vested under the contract. See also *Laugharen v. Bank of America*, 80 F.2d 551 (9th Cir. 1937), *cert. denied* 301 U.S. 699; *In re H. K. Porter Co.*, 24 F. Supp. 766 (W.D. Pa. 1938). Such divestment, however, is precisely the result intended by the KRC reorganization court in this case and tacitly approved by the Court of Appeals.

Only one case has been found where a bankruptcy court divested title as an incident to rejection of an executory

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[2]In the *American National Trust* case, the Seventh Circuit did allow rejection of unexecuted portions of the contract which placed heavy and speculative burdens on the debtor. As pointed out, page 7, supra, no such unexecuted burdens remain on KRC under the contract in question here.

contract. However, in *In re New York Investors Mutual Group,* 143 F. Supp. 51 (S.D. N.Y. 1956), the trustee held legal title to real property to which the purchaser had acquired equitable title under a contract of sale. Even then, the court required restitution of that portion of the purchase price already paid as a condition to rejection. In other words, rejection in the *New York Investors Mutual Group* case amounted to rescission, not forfeiture. A Chapter X trustee is not excused from the requirement of making restitution as a condition to rescission. *Parker v. Baltimore Paint & Chemical Corp.,* 244 F. Supp. 267, 270 (D.C. Colo. 1965). In this case, not only was restitution of the purchase price paid by TCC not required, but the KRC trustee admitted he would be unable to make such restitution. In this case, rejection amounts to forfeiture.

The effect of rejection of an executory contract is not entirely defined. Clearly, rejection constitutes a breach creating a claim for damages. Bankruptcy Act §§ 63c, 202, 11 U.S.C. §§ 103c, 602; *Workman v. Harrison,* 282 F. 2d 693 (10th Cir. 1960). How much more than a mere breach it effects is not clear. It has been suggested that rejection is an action *sui generis,* the effect of which must be determind by the circumstances of the case. *Ray v. Beneficial Finance Co.,* 92 N.J. Super. 519, 224 A. 2d 143 (1966). The most severe effect heretofore is found in *In re New York Investors Mutual Group.* 143 F. Supp. 51 (S.D. N.Y. 1956), where it amounted to rescission. The question of the scope of the relief a trustee may obtain by rejection is important in the administration of the bankruptcy laws.

In any event, it would seem that when rejection puts in issue the title to property received under a contract alleged to be executory, the action constitutes a suit and the parties whose title and interest in the property are at stake are entitled to the safeguards of a plenary proceeding.

It is the position of The Colorado Corporation that the 1/64 interest in the permit vested in John Mecom and then The Colorado Corporation more than one and a half years prior to the Chapter X petition is a vesting in possession. No court has found to the contrary.

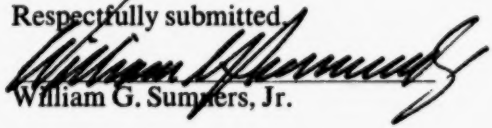
If divestment in the fashion thought to be achieved by the KRC trustee is possible, no title to property is safe from a reorganization trustee regardless of when the same has been vested whether in the persons summoned to the court or his ancestor.

No mortgagee, assignee, transferee, or purchaser appears to be safe from the doctrine annunciated by the reorganization court. The whim of the reorganization court has removed from the creditors of The Colorado Corporation, or indeed any creditor, the right to receive or look to the assets of any company against whom a reorganization trusteee asserts the right to reject, putting title in issue. All persons having a right to property are entitled to be heard and a plenary suit is the only proper forum.

CONCLUSION

The opinion in this matter of the United States Court of Appeals for the Tenth Circuit is in conflict with principles announced by Courts of Appeal in other circuits, and because this matter presents questions important in the administration of the bankruptcy laws which should be resolved, this petition for writ of certiorari should be allowed.

Respectfully submitted,



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Attorneys for William C. Lam,
Receiver

William C. Lam, Receiver of The Colorado Corporation, pursuant to authority granted by the Referee in Bankruptcy of the United States District Court for the District of Colorado, herewith joins in the Petition for Writ of Certiorari filed herein by The Colorado Corporation and adopts and urges the Reasons for Allowing the Writ as set forth in the petition filed by the said The Colorado Corporation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that three copies of this Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit have been served upon each party in accordance with the provisions of paragraph 1 of Rule 33, Revised Rules of the Supreme Court of the United States, by depositing such copies in the United States post office, airmail postage prepaid, this *24th* day of November, 1973, addressed to counsel of record for each party at the post office of each such counsel, as follows:

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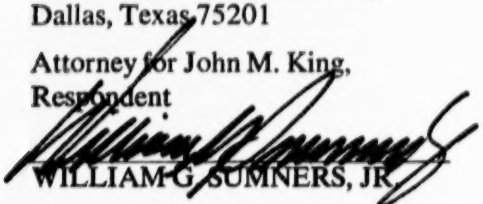

WILLIAM G. SUMNERS, JR.

Attorney for The Colorado Corporation,
Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

MAY, 1973, TERM

In Re John McCandish King, debtor in proceedings for an arrangement, JOHN M. KING, debtor,

Appellant,

No. 72-1474

v.

CHARLES A. BAER, Trustee,

Appellee.

In Re King Resources Company and International Resources Limited, debtors in proceedings for reorganization of corporations, JOHN M. KING,

Appellant,

No. 72-1515

and

THE COLORADO CORPORATION,

Appellant,

No. 72-1516

v.

CHARLES A. BAER, Trustee,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(D.C. Nos. 71-B-1630, 71-B-2921, 72-B-644)

[Filed June 19, 1973]

Before HILL, Circuit Judge; DURFEE* and HOLLOWAY, Circuit Judge

HILL, Circuit Judge.

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* Court of Claims, sitting by designation.

These three appeals from the District of Colorado stem from proceedings had under Chapters X and XI of the Bankruptcy Act. They involve common questions, thus the consolidation. No. 72-1474 arises out of the Chapter XI arrangement proceedings instituted by John M. King, debtor, who is appellant in that appeal. Nos. 72-1515 and 72-1516 both arise from proceedings had in the Chapter X matter instituted by King Resources Company and International Resources Limited as debtors in the proceedings for reorganization. John M. King is appellant in the first case, and The Colorado Corporation is appellant in the second case. Charles A. Baer, trustee in both bankruptcy proceedings, is appellee in each of the three appeals.

The controversies originate in sales by King Resources Company of two undivided 1/64th interests in Canadian federal oil and gas exploration permits. The contracts under which the interests in the permits were purchased outlined the mode of payment. Each 1/64th interest was to be sold for $5,218,241. The first payment of $260,912.05 was to be paid by the purchaser within fifteen days from the date of execution of the contract. Subsequent payments of $413,110.75 were to be made on June 1 and October 1 of each year from 1970 through 1975 in payment of the contract purchase price. The two purchase contracts which form the basis of these appeals were executed separately by John M. King and John W. Mecom.

King executed a contract to purchase a 1/64th interest on December 31, 1969, and made the initial payment of $260,912.05. He made no further payments, and now asserts his failure to make these payments was because King Resources Company had failed to satisfactorily account for exploration work and had generally failed in its duties to the purchasers. King also contends that King Resources Company owed him sufficient amounts of money on other activi-

ties to more than offset his payment obligation under the contract. The King Resources Company trustee disagreed and claimed that King Resources, after allowance of all proper payments and credits to King, was entitled under the contract to an additional $1,085,803.38 on December 31, 1971.

On May 19, 1971, the United States Internal Revenue Service (IRS) made jeopardy assessments against King personally totaling approximately $5,358,000, filed its notice of lien, and made levies. On June 1, 1971, King filed his original petition for a Chapter XI arrangement under the Bankruptcy Act (11 U.S.C. § 701, et seq.). On that same day, the arrangement proceeding referee issued, ex parte, an order staying suits and restraining levy, attachment or execution against King or his property (11 U.S.C. § 714).

On August 14, 1971, King Resources filed its petition for Chapter X reorganization under the Bankruptcy Act (11 U.S.C. § 501, et seq.). The petition was approved and the appellee was named as trustee. On March 16, 1972, the trustee filed with the King arrangement referee an application to modify the above referred to order staying suits. Attached to this application was the trustee's proposed application to the King Resources reorganization judge for an order to show cause why the executory contract between King personally and King Resources for the purchase of the interest in the exploration permit should not be rejected.[1] King resisted the trustee's application to modify the stay order on the basis that (1) the filing of the application for permission to reject an executory contract would constitute the commencement of suit in contravention of the stay order; (2) the 1/64th interest was a vested property

[1] 11 U.S.C. § 516(1).

interest and therefore subject to the exclusive jurisdiction of the King arrangement referee and beyond the jurisdiction of the King Resources reorganization judge to authorize rejection as an executory contract; and (3) the device of rejection of an executory contract cannot be used to divest a purchaser of his vested title. The referee on April 5, 1972, granted the appellee's application to modify the stay order, found that the application to reject the executory contract did not constitute the commencement of a suit, and left to the court the resolution of whether the contract was an executory contract. Immediately after this order was issued, the trustee filed with the court his application to reject the executory contract. The court ordered King to show cause why the executory contract should not be rejected by the trustee.

King, in the meantime, had filed an appeal to the United States District Court for review of the referee's order that the application to reject the contract did not constitute the commencement of a suit. On June 2, 1972, the district court affirmed the referee's decision. That decision of the district court has been appealed to this court and constitutes appeal No. 72-1474. King contends that the application to reject the contract as an executory contract was a "suit" and therefore should have been subject to the stay order.

On April 19, 1972, King filed his motion in the King Resources reorganization proceedings to stay final determination of the trustee's application to reject the executory contract pending the district court's review of the arrangement referee's order that the application to reject did not constitute a suit. King also presented a motion to dismiss the trustee's application on the basis that he had acquired a vested property right in the permits under the terms of the contract; therefore there was no executory contract over which the reorganization court could exercise jurisdiction to authorize rejection.

Trial on the merits of the trustee's application to reject the executory contract was held after King had been notified by the district court of its intention to affirm the arrangement referee's determination that the application of the trustee to reject the executory contract did not constitute the commencement of a suit within the proscriptions of the stay order. King initially asked that the trial be stayed pending his appeal to this court from the district court's affirmance of the arrangement referee's decision. This motion, as were motions to dismiss for lack of jurisdiction, for failure to join the IRS as an indispensable party, and for summary judgment, was denied by the trial court. After trial on the merits, the King Resources reorganization court ruled the contract was an executory contract and authorized the appellee to reject it. That decision is the basis of appeal No. 72-1515. In that appeal King asserts error in the trial court's refusals to grant his motion to stay, his motion to dismiss for lack of jurisdiction on his allegation that title had vested and therefore there was no executory contract, and his motion to dismiss for failure to join the IRS as an indispensable party. He also attacks the order authorizing rejection of the contract and contends this order, by implication, either erroneously divested him of his vested title or incorrectly found that title had not vested.

The Colorado Corporation, appellant in No. 72-1516, raises basically the same contentions raised by King in appeal No. 72-1515. On December 24, 1969, John W. Mecom executed a contract for the purchase of an undivided 1/64th interest in Canadian federal oil and gas exploration permits being sold by King Resources. The terms of the contract were the same as that of King. Mecom made the initial payment of $260,912.05 and, like King, made no further payments as required by the contract. On May 24, 1971, The Colorado Corporation acquired the Mecom interest. On

April 5, 1972, the trustee filed with the reorganization court his application to reject the contract as an executory contract. That court issued its order to The Colorado Corporation to show cause why the executory contract should not be rejected. The Colorado Corporation responded with its motion to dismiss in which it alleged its acquisition from Mecom was of his vested property interest which he had acquired under the contract. It also challenged the jurisdiction of the reorganization court and contended both the contract and the interest acquired were no longer executory. Trial on the merits was held concurrently as to both contracts. The trial court, following trial on the merits and the pronouncement of its order permitting rejection of the executory contract with King, made the same order equally applicable to The Colorado Corporation and authorized the trustee's rejection of the executory contract. The Colorado Corporation in its appeal raises issues which were also raised by King in No. 72-1515. These contentions will be dealt with concurrently, and therefore need not be separately stated at this juncture.

No. 72-1474

In this appeal, it is the appellant King's contention that the application to reject the executory contract was a suit which should have been stayed under the provisions of the arrangement referee's stay order. As the decision to issue an injunction staying the commencement of suits is committed to the discretion of the bankruptcy referee,[2] we do not deem it necessary to determine the status of the trustee's application to reject the executory contract as a suit. So too the decision of the referee to vacate a previously issued restraining order or to allow other proceedings relating to the

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[2]In Re Schokbeton Indus. 449 F.2d 321 (5th Cir. 1971); In Re Laufer, 230 F.2d 866 (2d Cir. 1956).

debtor's property is discretionary.[3] We find no abuse of the arrangement referee's discretion in permitting the trustee's application to reject the executory contract.

We now consider those issues raised only by appellant King in No. 72-1515 regarding asserted errors committed by the King Resources reorganization court. The first error challenges the court's denial of King's motion to stay, pending appeal of the district court's approval, proceedings relating to the trustee's rejection application. King contends the appeal in that case involved the basic question of the jurisdiction of the arrangement court and should, therefore, have been determined before this proceeding was allowed to continue. Appellant's reliance on Texaco, Inc. v. Liberty Nat'l Bank & Trust Co., 464 F.2d 389 (10th Cir. 1972), is misplaced. In the instant case each of the two courts was a court of bankruptcy, and each was exercising its own exclusive jurisdiction of the bankruptcy proceeding before it. In this situation the granting or denial of a motion to stay is within the sound discretion of the court.[4] There was no abuse of discretion.

King next contends the court erroneously denied his motion to dismiss for failure to join the IRS as an indispensable party. The contention is that the IRS, by virtue of its jeopardy assessments and levy on the property of King, had an interest in this property also and therefore should have been joined. The law is clear that "before an executory contract should be rejected, a judicial hearing and inquiry, at which interested parties might be heard, should be held, and that an executory contract could be rejected only with the permission of the court.* * *" Texas Importing Co. v. Banco Popular de Puerto Rico, 360 F.2d 582 (5th Cir. 1966). The notice requirements for the rejection of executory con-

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[3]See Mundt v. Southland Savings & Loan Ass'n, 354 F.2d 81 (9th Cir. 1965).
[4]See Pet Milk Company v. Ritter, 323 F.2d 586 (10th Cir. 1963).

tracts require only notice to the parties to such contracts. Any notice to other parties lies in the discretion of the judge.[5] It is apparent that the IRS was not entitled to any form of notice regarding the rejection of the executory contract. We note, however, that the trial court ordered that notice be given to creditors who had filed statements under §§ 210 and 211 of the Bankruptcy Act. 11 U.S.C. §§ 610, 611. The trial court further found that the IRS did have notice of the hearing. Their failuure to attend the hearing may properly be taken as indicative of their intention not to appear. The IRS was not an indispensable party to the rejection hearing.

Nos. 72-1515 and 72-1516

The remaining contentions are raised by appellants in both No. 72-1515 and No. 72-1516 and will be jointly resolved in this opinion. The first of these arguments challenges the determination by the reorganization judge that the contract was executory and therefore rejectable. The challenge takes various forms; however the basic contention is that a property interest in the exploration permits had vested under the contract, and therefore the contract no longer remained executory. Appellants urge the contract was beyond the jurisdiction of the reorganization court to reject, but rather was within the exclusive jurisdiction of the arrangement court. In Workman v. Harrison, 282 F.2d 693, 699 (10th Cir. 1960), we upheld the rejection of a contract which "was then executory in nature, neither party having completely performed and the obligations of each remaining

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[5] 11 U.S.C. § 516 provides: "Upon approval of a petition, the judge may, in addition to the jurisdiction, powers and duties in this chapter conferred and imposed upon him and the court—(1) permit the rejection of executory contracts of the debtor except contracts in the public authority, upon notice to the parties to such contracts and to such other parties in interest as the judge may designate." (Emphasis added).

complex." Our decision there was based on the highly speculative probability of success and the additional expenditure of large sums of money which made the continued performance of the contract both "burdensome and risky." We hold the trial court here correctly found the contract to be executory, and properly permitted its rejection.

Appellants next assert error in the reorganization court's rejection of the executory contracts without also requiring restitution of the purchase price paid by each under the contracts. Rejection of the executory contract constitutes a breach of contract as a matter of law which entitles the other party to the contract to assert a claim for such breach for determination by the court.[6] There is no basis for the requirement of restitution upon the rejection of the executory contract.

Appellants last challenge the decision to reject the executory contract as not being warranted by the dictates of equity or sound business judgment.[7] The rejection of an executory contract is committed to the discretion of the judge, and will be reversed only on a showing of abuse of that discretion.[8]

We find no such abuse here.

Each of the judgments appealed from is affirmed.

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[6]Workman v. Harrison, 282 F.2d 693 (10th Cir. 1960).

[7]Group of Institutional Investors v. Chicago, M., St. P. & P. R. Co., 318 U.S. 523 (1943).

[8]6 Collier on Bankruptcy, ¶ 3.23[4] at 571.

JULY TERM — AUGUST 13, 1973

Before Honorable Delmas C. Hill, Circuit Judge, Honorable James R. Durfee, Judge, Court of Claims, and Honorable William J. Holloway, Jr., Circuit Judge

IN THE MATTER OF:
JOHN McCANDISH KING,
Debtor-Appellant,
v.
CHARLES A. BAER, Trustee, for King Resources Company and International Resources Limited,
Trustee-Appellee.
No. 72-1474

IN THE MATTER OF:
KING RESOURCES COMPANY and INTERNATIONAL RESOURCES LIMITED,
Debtors,
JOHN M. KING,
Appellant,
v.
CHARLES A. BAER, Trustee,
Appellee.
No. 72-1515

IN THE MATTER OF:
KING RESOURCES COMPANY and INTERNATIONAL RESOURCES LIMITED,
THE COLORADO CORPORATION,
Appellant,
v.
CHARLES A. BAER, Trustee,
Appellee.
No. 72-1516

This matter comes on for consideration of the petitions for rehearing filed by the Appellants, John M. King and The Colorado Corporation.

Upon consideration whereof, the petitions for rehearing are denied.

HOWARD K. PHILLIPS,
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF COLORADO

IN THE MATTER OF KING RESOURCES
COMPANY and
INTERNATIONAL RESOURCES LIMITED

Debtors in Proceedings for Reorganization of Corporations

No's. 71-B-2921 and 72-B-644

TRANSCRIPT OF PROCEEDINGS

Findings, Conclusions and Order of the Court

[179] [THE COURT:] As I understand the position of Mr. King here, he says he has a vested interest, is that correct?

MR. ROCHELLE: It's quite correct, Your Honor.

THE COURT: In what?

MR. ROCHELLE: In an undivided 1/64 interest in the Arctic permits.

THE COURT: I understand that, but is it in real estate or is it in personalty?

MR. ROCHELLE: It's in personalty.

THE COURT: Well, then, you and I are getting along pretty well so far.

Now, is it, in fact, personalty — at least we're in agreement it isn't real estate — the contract says that it should be construed pursuant to the law of the State of Colorado. Nobody has given me any suggestion as to what the law of the State of Colorado is as to the nature of these interests.

[180] Under the law of the State of Colorado, what's a working interest? Do we allow the Louisiana rule or the Oklahoma rule or a rule all our own?

MR. ROCHELLE: Your Honor, the contract says the law of the State of Colorado shall apply in the interpretation of the contract. I think that the subject matter of the contract must take its measure from the law of the forum which created it, which is the Government of Canada.

THE COURT: I'm not so sure of that. And how do I find out what the law of Canada is? Who's going to educate me on that?

When the parties see fit to draw a contract which says that the law of Colorado shall apply and when you hand me a document, which I think I know what it is under the law of Colorado — and gentlemen nobody has given me any help as to these things — what possessory rights does the holder of a working interest have? What possessory rights does the holder of an overriding royalty have? What possessory rights does the holder of a hunting and fishing permit on private land have? What possessory rights does the holder of a permit to use US forest land for commercial guide purposes have? What possessory rights does the holder of a permit to conduct geophysical testing on lands withdrawn under the mining laws of the United States have?

I think the answers to those questions are rather [181] vital to this case, gentlemen.

Now, let me ask you this: What comparisons have you made between the Canadian permits, with which we are here confronted, and permits not infrequently issued by the Department of the Interior in this country for purposes of exploration? Are you at all familiar with them?

MR. ROCHELLE: I'm familiar with the Canadian per-

mits, Your Honor, because we went to the trouble of getting an opinion from a Canadian lawyer, twenty pages long. We did not introduce it in this matter because it was stipulated that the interest was not real property and we didn't think it was material.

THE COURT: I understand it's not real property, we are in agreement on that. But, gentlemen, let me say this, that I am of the belief that with the possible exception of the working interest, under the law of the State of Colorado, none of the other interests create a possessory right.

I think you're all puzzled by why I'm so fascinated as to whether it creates a possessory right or whether it does not. Let me tell you why I am quite interested in that. I got into this a little earlier today, but nobody would rise to the bait.

The possessory right is the key test of whether this contract represents a chose in possession or a chose in action.

Now, if you will consult a work so elementary and [182] basic as American Jurisprudence, you will find that a chose in action is typically defined as an executory contract and a chose in possession is defined to be the exact opposite of an executory contract.

I recognize that you gentlemen have a hearing tomorrow before the Referee in Bankruptcy. I think it only fair that you know what my thinking is, and I propose to tell you that now, but I shall formalize this by a written Order. It's too late in the day for me to dictate an impromptu Order to be appealed, but I think it only fair that you know basically what I think, and I surely shall expand on this in the written Order.

I think that Mr. King entered into a contract with King Resources. I think that under that contract — let me find it here — well, I'm having trouble. One reason is I've got the wrong file.

I think that under that contract Mr. King agreed to pay certain sums of money, part of which — half of which — were purchase price, half of which were variously described as exploration costs and various types of expenses. The total price which Mr. King apparently agreed to pay was $5,218,214.

He made the down payment. That's the only payment he did make. I fully recognize that Mr. King says that that's all he owed for several reasons, among which are the reasons that only the down payment should be applied on purchase price [183] and that he had setoffs.

To arrive at the first conclusion, Mr. King reads one sentence from paragraph 6 of the Agreement, namely, the sentence: "All subsequent payments shall be applied on exploration work until purchaser's share of costs of exploration shall have been paid. Thereafter all amounts shall be paid on the purchase price."

Mr. King quits reading there. The Agreement doesn't end there. It goes ahead:

"Provided that at any time amounts KRC received from purchaser are in excess of funds currently needed for purchaser's share of exploration costs, KRC shall notify purchaser and shall apply the excess upon the unpaid portion of the purchase price."

I think the evidence clearly establishes and has established and I find that Mr. King was, in fact, in default under this Agreement.

I further find that he has failed to establish that he has sufficient setoffs recognizable under the law which would discharge his obligation to make the payments which have already accrued and become due under the contract.

And it is for these reasons, then, that I find that Mr. King is in default.

I am fascinated by testimony which shows that in the space of eighteen months, property for which Mr. King [184] contracted to pay 5 million dollars and has, in fact, paid approximately a quarter of a million dollars and that's all, has now in the opinion of Mr. King reached the value of 63 million dollars.

It has been argued that equitable principals apply. I agree. Indeed, I do agree. I have difficulty finding, as a matter of equity, that equity requires that what amounts to a down payment of — let's see, it would be 5% in round figures — that a 5% down payment, with the default in the installments which have accrued in the interim, should result in cementing John King personally into an investment which he says has increased in value from 5 million to 63 million in eighteen months; and that he should do this at the expense of the stockholders and creditors in the Chapter X proceeding.

Now, I recognize that the creditors of John King are also entitled to consideration. And I recognize that we have the difficult situation hereof two bankruptcies, where all I can do is to adopt equitable principals which will do the most people the most good.

I find from the evidence that the business judgment exercised by Mr. Baer in electing and deciding to reject this contract, was and is reasonable, competent, and I think it fair to say, excellent business judgment, particularly if the testimony of Mr. King be accepted. I think that the testimony of Mr. King served to magnify the wisdom of Mr. Baer's [185] judgment in rejecting this contract.

I think it apparent from what I've already said that I believe I find, I conclude and I hold, that the contract in ques-

tion is, in fact and in law, an executory contract which is subject to rejection by the Trustee pursuant to the provisions of Section 116.1 of the Bankruptcy Act, 11 USC, Section 5161.

I authorize expressly the Trustee to reject that certain contract which was made and entered into December 3, 1969, by and between King Resources Company, a Maine Corporation, and John M. King, which contract I have found, of course, and I have held is an executory contract and which contract, of course, is the subject of the Order to Show Cause which initiated the hearing we have had here today.

Now, gentlemen, I said some fifteen minutes ago that I was just going to briefly comment on what I was going to hold and I find that I got carried away. Accordingly, this will be the Order of the Court, Findings and Conclusions of the Court and no further written Order will be entered; and the Order will be effective as of this date, so that you can get going in a hurry on your Appeal.

I think you'd rather have an inartfully phrased Order subject to an immediate Appeal than you would rather have me hold you around here until I could get up an Order in which I might like the grammar a little better.

[186] But you'd like to get going, wouldn't you, Mr. Rochelle?

MR. ROCHELLE: Your Honor, there's not that big a rush about it. If the Court would like to take more time to prepare —

THE COURT: No, I'm not happy with it. The Court of Appeals is just going to have to get used to my poor grammar.

MR. PFEIFFER: If it please the Court, I think if that is the ruling of the Court, I would like to have the Court comment on two things: One, that the claim of the Chapter XI Arrangement has the exclusive jurisdiction over this, and I believe in your discussion you should make some statement as to non-possessory rights. I would like the Court to make a finding in regard to whether John M. King or The Colorado Corporation acquired any possessory rights by reason of these agreements.

THE COURT: Every finding and conclusion I have made is fully applicable to The Colorado Corporation and every finding and conclusion I have made as to John M. King is binding on The Colorado Corporation. I will not repeat them, I will just expressly state that. I thought I had. But the contract neither gives John M. King nor The Colorado Corporation any possessory rights in the property. And I know I mentioned it in the earlier discussion. If I failed to find it, it was an oversight, but I add that to my findings.

[187] MR. PFEIFFER: I don't believe so. I assume by that you're saying the Arrangement proceeding does not have exclusive juurisdiction.

THE COURT: Correct.

* * *

Bankruptcy Act § 63c, 11 U.S.C. § 103c:

Notwithstanding any State law to the contrary, the rejection of an executory contract or unexpired lease, as provided in this Act, shall constitute a breach of such contract or lease as of the date of the filing of the petition initiating a proceeding under this Act.

Bankruptcy Act § 116(1), 11 U.S.C. § 516(1):

Upon the approval of a petition, the judge may, in addition to the jurisdiction, powers, and duties hereinabove and elsewhere in this chapter conferred and imposed upon him and the court —

> (1) permit the rejection of executory contracts of the debtor, except contracts in the public authority, upon notice to the parties to such contracts and to such other parties in interest as the judge may designate:

Bankruptcy Act § 202, 11 U.S.C. § 602:

Sec. 202. In case an executory contract shall be rejected pursuant to the provisions of a plan or to the permission of the court given in a proceeding under this chapter, or shall have been rejected by a trustee or receiver in bankruptcy or receiver in equity in a prior pending proceeding, any person injured by such rejection shall, for the purposes of this chapter and of the plan, its acceptance and confirmation, be deemed a creditor.* * *

Bankruptcy Act § 311, 11 U.S.C. § 711:

Where not inconsistent with the provisions of this chapter, the court in which the petition is filed shall, for the purposes of this chapter, have exclusive jurisdiction of the debtor and has property, wherever located.